UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

NATIONAL ASSOCIATION OF LETTER CARRIERS, BRANCH 124, AND NATIONAL ASSOCIATION OF LETTER CARRIERS AFL-CIO (UNITED STATES POSTAL SERVICE), Respondents, - and - DEBORAH RUTHERFORD, AN INDIVIDUAL, Charging Party.	:	Case Nos. 15-CB-084264 15-CB-095238

BRIEF OF RESPONDENTS NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO AND BRANCH 124, NALC IN RESPONSE TO COUNSEL FOR THE GENERAL COUNSEL'S CROSS-EXCEPTIONS

Thomas N. Ciantra
COHEN, WEISS AND SIMON LLP
330 West 42nd Street
New York, New York 10036-6979
(212) 563-4100

Attorneys for Respondents
National Association of Letter
Carriers, AFL-CIO and Branch 124, NALC

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PRELIMINARY STATEMENT

The Board has a long-standing policy that it will refuse to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence is to the contrary. Counsel for the General Counsel's Cross Exceptions to the October 23, 2014, decision of Administrative Law Judge ("ALJ") Robert A. Ringler dismissing charges that the Respondent Unions violated Sections 8(b)(1)(A) and (2) of the Act is nothing more than a plea that the Board position itself as the trier of fact and revisit each and every credibility determination the ALJ made after hearing the evidence and assessing the demeanor of the witnesses. Pointing to no errors of law in the ALJ's decision, these exceptions are properly overruled.[1]

The Section 8(b)(1)(A) and (2) claims at issue here center around whether Respondent Branch 124 of the National Association of Letter Carriers (the "Branch") processed a grievance in bad faith to punish the Charging Party, letter carrier Deborah Rutherford, because she is not a member of the Respondent National Association of Letter Carriers ("NALC" together with the Branch, the "Union"). The ALJ found that the Union acted reasonably and in accordance with its duty of fair representation and dismissed the Complaint.

Under Article 41 of the nationwide collective bargaining agreement between NALC and the U.S. Postal Service, the Postal Service must declare a letter carrier's duty assignment (or route) vacant and post it for bid if the carrier has been detailed to a supervisory position in excess of four months. As the ALJ found, the record is clear that Rutherford was detailed to a supervisory position in excess of four months when the Branch filed a grievance

[1] Throughout this brief Counsel for the General Counsel's Brief in Support of Cross-Exceptions to Decision By Administrative Law Judge, dated January 16, 2015, is cited as "Br."

because Postal Service time records reflect her classification (and pay) at a supervisory level for more than four months and the Postal Service had not declared her route vacant.

The Postal Service denied the grievance at the initial Informal A Step of the grievance process. The Branch appealed to the next step in the process, Formal A. There, Montreal Cage, a Branch representative who did not know or work with Rutherford, met with management's representative, Paulette Gabriel, and, upon review of Rutherford's time records, both concurred that Rutherford had been detailed to a supervisory position in excess of four months. Accordingly, they agreed to resolve the grievance. When the Postal Service did not timely declare the route vacant and post it, the Branch filed grievances to enforce the settlement. Eventually, the non-compliance issue was advanced beyond the local level and resolved by a joint-labor management disputes resolution team. The Postal Service then posted the route in accordance with the local memorandum of agreement between the Postal Service and the Branch and the national agreement.

At trial, and now in support of a plethora of exceptions, Counsel for the General Counsel attempts to create an inference that this was something other than a bona fide enforcement of the labor agreement by the Branch – something the Branch and NALC are enjoined to do under the duty of fair representation. General Counsel urges that Rutherford really had not exceeded the four month period because she worked one day as a letter carrier and management sought, but failed to have her properly classified for those dates. As the ALJ found the time records the Branch and management reviewed showed that Rutherford was classified and paid at the supervisory rate for time more than four months and those records were not modified. The Branch had a good faith basis to pursue the grievance, as the ALJ concluded.

In particular, in reviewing the evidence on the issue of animus, the ALJ noted the documentary evidence that established the Branch processed grievances under the same contractual provision that adversely affected NALC members. The ALJ carefully assessed the credibility of the witnesses. He rejected the testimony of Branch representatives who denied knowledge of Rutherford's membership status, crediting their testimony in other respects, including that other letter carriers prompted the shop steward at Rutherford's post office (Steven Ancar) to investigate whether Rutherford had exceeded the contractual limitation. The ALJ also credited the testimony of the management representative Paulette Gabriel who settled the grievance at Formal Step A of the grievance process, finding her demeanor stellar and her testimony glaringly honest.

The ALJ heard the witnesses and based his decision on a detailed assessment of witness demeanor and credibility. The ALJ rejected the contortions of the record urged by Counsel for the General Counsel which Counsel would now have the Board adopt. The Board should now do likewise. Counsel for the General Counsel's Cross-Exceptions should be overruled.

STATEMENT OF FACTS

The following statement of facts is drawn from the ALJ's decision (cited throughout as "ALJD").

A. The Parties

The Charging Party Deborah Rutherford is a city letter carrier employed by the Postal Service in New Orleans, Louisiana. (ALJD at 2; Tr. 501 (Rutherford)). NALC represents city letter carriers employed by the Postal Service nationwide. (ALJD at 2; *see* RU-5 Art. 1 (Recognition)). The Branch represents letter carriers employed in New Orleans. (ALJD at 2). In March 2011, Rutherford resigned membership in NALC. (ALJD at 3; Tr. 504-05

(Rutherford)). She had been a member of NALC for the preceding six years and off and on in the prior years. (ALJD at 3; Tr. 551 (Rutherford)).

B. The Collective Bargaining Agreement

The terms and conditions of letter carrier employment are set in the nation-wide CBA between NALC and the Postal Service. (ALJD at 2; *see* RU-5). In addition, the parties have also promulgated a Joint Contract Administration Manual ("JCAM") (ALJD at 3 and n.5; RU-6), The JCAM is intended to be "used by the local parties in the expedited and regular arbitration forums as dispositive of those [contract] issues covered by the manual." (RU-6 Preface). The JCAM contains the terms of the agreement and, in addition, provides agreed interpretations of contract language as well as related memoranda of agreement and arbitral authority.[2]

The national agreement, Article 41 Section 1.A.2. states in relevant part: "The duty assignment of a full-time carrier detailed to a supervisory position . . . in excess of four months shall be declared vacant and shall be posted for bid in accordance with this Article." (ALJD at 2-3; RU-6 Art. 41.1.A.2 (p. 116)). It further states, "[a] letter carrier temporarily detailed to a supervisory position will not be returned to the craft solely to circumvent the provisions of Section 1.A.2." (*Id.*) As National Business Agent Peter Moss testified, letter carrier collective bargaining agreements have contained such a provision since 1971. (Tr. 631-32 (Moss)). In early agreements, the Postal Service was required to declare a route vacant after six months; that was modified to four months in 1978. (*Id.*).[3]

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[2] NALC publishes the agreement on its website, www.nalc.org. (ALJD at 3; Tr. 386-387 (Vigee); Tr. 636-637 (Moss)). The JCAM is available in virtually every Postal Service facility. (ALJD at 3).

[3] The National Agreement also requires that letter carrier work be performed by letter carriers under the terms of the Agreement. Article 1.6.A. of the Agreement states that "Supervisors are

C. Rutherford's Assignment to Management

Rutherford began to work as a temporary supervisor, known in the Postal Service as a 204b,[4] on January 31, 2012 with an assignment date through June 2, 2012. (ALJD at 3; Tr. 45 (Bart); GC-6(a)). On February 18, 2012, Rutherford's supervisor, Chastity Bart, cancelled her temporary supervisory detail and on that date Rutherford did letter carrier craft work. (ALJD at 3). Rutherford's time and attendance records however have her classified and paid at management rates for that date however and she continued to be compensated as a manager through late June. (ALJD at 3 n.8, 4).[5]

In February 2012 Rutherford discussed her supervisory detail with Branch shop steward Steven Ancar. (ALJD at 4). Ancar told her that in 120 days Rutherford would need to return to her route. (*Id.*). Rutherford questioned this, having understood previously that the period was six months. (*Id.*) Rutherford and Bart testified that Rutherford asked Ancar for a copy of the agreement but that he told her she could get it for herself; Ancar denied that she made the request. (Tr. 512 (Rutherford)). The ALJ resolved the credibility issue by crediting Rutherford and Bart's testimony on this issue. (ALJD at 4).

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prohibited from performing bargaining unit work at post offices with 100 or more bargaining unit employees, except" under limited circumstances. (RU-6 Art. 1.6.A.).

[4] The Board has found that letter carriers temporarily assigned to 204b supervisory positions in the Postal Service, as Rutherford was, are supervisors within the meaning of Section 2(11). *See Postal Service*, 302 N.L.R.B. 701, 703 (1991) (citing to *Letter Carriers*, 240 N.L.R.B. 519, 519 (1979) (finding that 204b's have "the same authority as permanent supervisors and can discipline employees and adjust grievances on behalf of the Postal Service.")). Rutherford's status as a supervisor forms the basis of the Union's exception to the ALJ's finding that it violated Section 8(b)(1)(A) of the Act by failing to give Rutherford a copy of the collective bargaining agreement upon her request while she was serving as a 204b.

[5] The management pay code appears on Rutherford's time and attendance report as "H/L E-17." (*Id.*; GC-7).

D. The Grievance Process Under the National Agreement

Article 15 of the agreement contains a multi-step grievance and arbitration process. (*See* RU-5 Article 15). A grievance is presented to the carrier's immediate supervisor at the Informal A Step of the grievance process within fourteen days of the date the employee or union first became aware of (or reasonably should have become aware of) the facts giving rise to the grievance. Either the individual employee or a shop steward may do so. If it is unresolved, the Branch may advance the case to Formal A where the grievance is addressed by the installation head or designee and a representative of the Branch. If the grievance is not granted or settled at Formal A, the grievance may be advanced by the Branch to Step B where it is heard by a Dispute Resolution Team ("DRT") comprised of a Postal Service representative and a NALC representative (selected by the national union, not the Branch) who may either resolve or deadlock over the issue. NALC may advance deadlocked cases (at the regional level) to arbitration.

E. The June 20, 2102 Exchange Between Rutherford and Ancar

Bart testified that on June 20, 2012 Ancar approached her and Rutherford and told them that Rutherford had exceeded the contractual time limit and that other carriers "had been watching and waiting." (ALJD at 4 (quoting from Tr. at 68-70 (Bart)). Bart asked Ancar to let it go since Rutherford was only a few days over the limit and Ancar responded that Bart was "putting him in a pickle" since Bart was asking for one thing and others were asking him to do something else. (*Id.*) Bart questioned why Rutherford had not been warned before, recalling that other 204b's had been and citing Keyna Roybiske as an example. (ALJD at 5). Ancar responded that he was not obliged to do so. (*Id.*). He had, months earlier, told Rutherford that she would need to end her detail within 120-days. (ALJD at 4).

Bart also testified that she asked Ancar whether a one-day gap in Rutherford's supervisory detail would create a new four-month period and that Ancar said that it would. (ALJD at 5; Tr. 71 (Bart)). Noting that this testimony contradicted Article 41 of the agreement which provides that "[a] letter carrier temporarily detailed to a supervisory position will not be returned to the craft solely to circumvent the provisions of Section 1.A.2," and the fact that Ancar filed a grievance two days later, the ALJ determined not to credit this part of Bart's testimony. (ALJD at 5 n.11).

F. The Grievances at Issue

1. The Article 41 Grievance

Ancar testified that various carriers, including Guy Banks, lobbied him to file a grievance under Article 41 Section 1.A.2. (ALJD at 5; Tr. 178, 210-11 (Ancar), 297 (Banks)). The ALJ credited Ancar's testimony on this point, finding "[h]is demeanor . . . believable, his testimony was consistent" and noting that it was "highly probable" that other carriers would have been interested in Rutherford's route which was a mounted route with little walking, minimal outdoor exposure and the weekend off. (ALJD at 5).[6]

On June 22, Ancar filed a class action grievance under Article Section 1.A.2 alleging that the Postal Service violated the agreement by failing to post Rutherford's route for bid because she held "a supervisory position in excess of 120 days." (ALJD a 5; GC-13).

[6] Banks testified that he eventually bid on and was awarded the route because it was less taxing than his walking route and the Postal Service had said there was no work available consistent with Banks' physical condition otherwise. (Tr. 279-280 (Banks)).

When management denied the grievance at Informal A, Ancar's role in its processing ended. Ancar delivered the Form 8190 and the supporting documents he had collected to the Union hall. (Tr. 220-221 (Ancar); Tr. 373-374 (Vigee)). Charles Vigee, the Branch president, testified that he briefly discussed the grievance with Ancar and told him that based on the clock rings the case was "pretty cut and dry." (*See* ALJD at 6; Tr. 375 (Vigee)). Vigee prepared the Branch's statement of position for presentation at Formal A. (GC-14). That statement alleged that "Rutherford was detailed to a supervisor position (H/L E0 17) . . . [and] served in that capacity in excess of four (4) months/120 days before returning to the craft." (GC-14). It pointed to the clock rings as evidence of same. (*Id.*).[7]

Vigee designated Montreal Cage, a steward at another Postal Service facility, to represent the Branch at Formal A. (Tr. 387-388 (Vigee); Tr. 304-305 (Cage)). Cage did not know Rutherford (they worked at different facilities) and he had no knowledge concerning her membership status. (Tr. 315 (Cage); *see* Tr. at 578 (Rutherford) (confirms that she did not know Cage); ALJD at 9 (no evidence that Cage knew of Rutherford's membership status). Cage did not discuss that with either Ancar or Vigee. Cage did not discuss the grievance with Ancar at all. (Tr. 316 (Cage)). Vigee testified that he may have had a brief conversation with Cage identifying the nature of the case. (Tr. 388-89 (Vigee)). Cage did not recall whether he discussed the case with Vigee. (Tr. 316-17 (Cage)).

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[7] General Counsel asserts that the Union was consistently unclear as to what standard applied to the grievance because in the Form 8190 Vigee phrased the issue as whether Rutherford had been detailed in excess of "120 days" rather than "four months." (Br. at 42; *see* GC-13 (Item 15)). The ALJ noted that the Branch used "120 days" or "four months" interchangeably in contract enforcement. (ALJD at 6 n.14; Tr. 344 (Vigee)). This is reflected in the statement Vigee prepared in support of the grievance. (GC-14). It is also reflected in DRT decisions on cases under Article 41.1.A.2. (*See* GC-22 at p. 4 (in arbitration Postal Service contended that Article 41.1.A.2 requires a detail of "120 days"). This issue is a red herring.

The ALJ concluded that Vigee's testimony concerning the processing of the grievance and other grievances where the Branch pursued the same issue with other 204b's was "essentially unrebutted, plausible and consistent with documentary evidence." (ALJD at 6). In this regard there was record evidence that the Branch processed grievances involving letter carriers:

- Wanda Riley, who Vigee believed (although he was not certain) was a member of the Union (Tr. 397 (Vigee); RU-2A, RU-2B);
- Darlene Torregano, who attended the NALC convention with her husband who was active in the Union (Tr. 403-405 (Vigee); RU-3A, RU-3B);
- Kenya Roybiske, whose membership status was unknown to Vigee (Tr. 409 (Vigee); RU-4A, RU-4B); and
- Lori Chambers (RU-5A, RU-5B).

Cage met with Postal Service Supervisor Paulette Gabriel at Formal A on June 28. (ALJD at 5-6). Gabriel testified that she reviewed Rutherford's time and attendance records and concluded that the grievance was valid. (ALJD at 6; Tr. 483-84 (Gabriel)). Cage and Gabriel executed a settlement. (ALJD at 5-6; GC-15). That agreement provides that management "failed to post the bid assignment of a carrier (Full-time City Carrier D. G. Rutherford) detailed to a supervisory position in excess of four (4) months in accordance with Section 41.1.A.2 of the National Agreement." (*Id.*) As a remedy, the parties agreed to have "the duty assignment of the full-time carrier declared vacant and posted for bid." (GC-15).

Gabriel also testified that she was unaware that Rutherford was not an NALC member and that this was never communicated to her. (ALJD at 6). Specifically, Gabriel testified that no one from the Union told her that Rutherford was not an NALC member; nor did

they tell her that the Branch was only pursuing the grievance because of Rutherford's status as a non-member. (Tr. 491 (Gabriel)). Gabriel does not have access to information concerning Union membership status and, as she testified she did not "need that information" in her position. (Tr. 482 (Gabriel)).

As the ALJ noted, Rutherford stated that on July 5, she spoke with Gabriel who told her that she (Gabriel) had heard from unidentified persons that if Rutherford was an NALC member "all of this would have been taken care of." (ALJD at 6 (quoting Tr. 527 (Rutherford)). Gabriel denied having said any such thing to Rutherford. (Tr. 491 (Gabriel)). The ALJ credited Gabriel's denial noting that Gabriel was "a superior witness, with a stellar demeanor." (ALJD at 6).

2. The Non-Compliance Grievances

When the Postal Service failed to timely post Rutherford's route, Ancar filed a grievance on July 17, 2012, alleging non-compliance with the Formal A settlement. (Tr. 201-02 (Ancar); GC-16). Management settled that grievance at Formal A and agreed to post the route. (*See* GC-17A at p. 2 (referencing settlement of the initial non-compliance grievance on August 23)). But management did not timely comply with that Formal A settlement. On October 1, 2012, Ancar filed a second non-compliance grievance (GC-17D), which was impassed at Formal A and resolved by the DRT on October 29, 2012. (Tr. 203-04 (Ancar); GC-17A). As a result of that grievance, the vacant route was posted on November 13 and Banks was the successful bidder. (Tr. 204-05; GC-17B, GC-17C).

G. The ALJ's Decision

The ALJ concluded that the Union met its duty of fair representation in pursuing the grievance for six reasons. In particular, the ALJ concluded that the Article 41 Section 1.A.2 of the agreement was "non-discriminatory" on its face and that the Branch's view that the

agreement was violated because Rutherford had been paid as a supervisor from January 31 through June 20 was "rational." (ALJD at 8). The ALJ also reasoned that management's settlement of the grievance was further proof of its reasonableness because management had "no axe to grind" with Rutherford (who was a management prospect) and would gain nothing from agreeing to the settlement. (*Id.*) Third, that the Branch had pursued analogous grievances of unknown membership status undercut the contention that it was motivated to act based on Rutherford's non-member status. (*Id.*) The ALJ also noted that enforcement of the contract furthered the Union's legitimate goal of making letter carrier routes available to carriers, and not kept in "limbo" for employees working in management. (ALJD at 8-9). Fifth, there was no evidence that Cage knew of Rutherford's status when he settled the grievance. (ALJD at 9). Finally, the ALJ pointed to the fact that Ancar told Rutherford in February that she had 120 days to return to her route, a "benevolent warning" which "hardly smacks of invidious intent." (*Id.*).

ARGUMENT

GENERAL COUNSEL'S EXCEPTIONS SHOULD BE OVERRULED

Under Section 8(b)(1)(A), a union owes represented employees a duty of fair representation. *See Miranda Fuel Co.*, 140 N.L.R.B. 181 (1963). A union "necessarily has a wide range of discretion in serving the unit it represents" subject only to the requirement that the union's conduct not be arbitrary, discriminatory or in bad faith. *General Motors Corp.*, 297 N.L.R.B. 31, 32 (1989); *accord Ford Motor Co. v. Huffman*, 345 U.S. 330, 337-38 (1953). The fact that collective bargaining decisions may disadvantage particular individuals standing alone does not establish a violation of the duty of fair representation or, derivatively, a violation of Section 8(b)(2). Otherwise every collectively-bargained decision would be subject to revision by the Board or in litigation. For these reasons, as the Supreme Court held in *Air Line Pilots Ass'n*

v. O'Neill, a union acts arbitrarily only where its decisions fall so far outside a wide range of reasonableness as to be "irrational." 499 U.S. 65, 67 (1991).

These same considerations apply in grievance administration. Enforcement of collective bargaining agreement provisions may similarly disadvantage particular bargaining unit members but, standing alone, a union's acts in enforcing a collective bargaining agreement do not violate Sections 8(b)(1)(A) or (2). *See General Motors*, *supra*, 297 N.L.R.B. at 32; *Local 235, UAW*, 313 N.L.R.B. 36, 37 (1993); *International Bhd. Of Elec. Workers, Local 1701*, 252 N.L.R.B. 820, 831 (1980). In cases where the union is alleged to have breached the duty in contract enforcement, the issue is not whether the union was correct in its contract interpretation but "whether the Union made a reasonable interpretation of the two provisions or whether it acted in an arbitrary manner." *General Motors*, 297 N.L.R.B. at 32. Of course, as the Board held in *Local 1701*, "in seeking to support the contract . . . [the union] is acting directly in support of the obligation imposed on a statutory representative to represent all employees without hostile discrimination, fairly, impartially and in good faith." 252 N.L.R.B. at 831.

In *Local 1701*, for example, General Counsel alleged that the union's refusal to agree to a beneficial settlement of a discharge grievance concerning two non-members violated Section 8(b)(1)(A) of the Act. But the union contended that the employer's offer of settlement, a one week suspension, would have, in effect, undermined the job referral system under the collective bargaining agreement by advantaging the grievants over union-represented employees using the collectively-bargained assignment process. *Local 1701*, 252 N.L.R.B. at 831. As the ALJ in that case concluded, "[a]bsent pretext, there is nothing inherently unlawful in the Union's position in supporting the contractual rights of all employees." *Id.; see also General Motors*, 297

N.L.R.B. at 32-33 ("it [is] immaterial . . . absent evidence of discriminatory intent, that [the Charging Party] was adversely affected by the Union's interpretation").

Here, as the ALJ concluded, the position the Branch advanced in pursuing the grievance was entirely reasonable. To determine whether Rutherford was "detailed to a supervisory position . . . in excess of four months" (RU-6 Art. 41.1.A.2 (p. 116)), it looked to whether Rutherford was classified and paid as a supervisor. (Tr. 213-216 (Ancar); *see* GC-14). So did management. (Tr. 455 (Gabriel)). Indeed, this was the approach taken by the DRT in other cases arising out of the same installation. (RU-2B, -4B). Those decisions are precedential and governed the grievance involving Rutherford's route. (*See* RU-6 at p. 15-8).

The clock rings the Branch had (RU-1) show that Rutherford was classified and paid as a supervisor from (at least) February 18, 2012 through June 20, 2012 (inclusive). If anything, as Vigee testified, the fact that Postal Service assigned Rutherford bargaining unit work while she was detailed to a supervisory position (as shown by the "H/L E0-17" code on the time records was a violation of Article 1.6.A. (Tr. 379 (Vigee)). The Postal Service should have declared Rutherford's duty assignment vacant and posted it for bid. Of course, if the Branch had not grieved the issue faced with its knowledge of the facts, it would have likely faced a claim that its failure to do so breached its duty of fair representation.

The ALJ properly concluded that the Union had not violated either Section 8(b)(1)(A) or (2) of the Act. The Board has a long-standing policy that it will refuse to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence is to the contrary. *See Standard Dry Wall Products*, 91 N.L.R.B. 544 (1950), *enf'd,* 188 F.2d 362 (3d Cir. 1951). The Board explained, that "as the demeanor of witnesses is a factor of consequence in resolving issues of credibility, and as the [ALJ], but not the Board, has

had the advantage of observing the witnesses while they testified, it is our policy to attach great weight to a[n ALJ]'s credibility findings insofar as they are based on demeanor." *Id.* at 545. We show below that none of Counsel for the General Counsel's conclusions warrant revising the ALJ's decision.

We address the General Counsel's 26 cross-exceptions thematically.

A. Exceptions Related to Carrier Requests that Ancar Enforce Article 41 Section 1.A.2 (No. 13)

Counsel for the General Counsel takes exception to the ALJ's finding (ALJD at 5), that letter carriers lobbied Ancar to enforce Article 41 Section 1.A.2. (Exception 13). The ALJ based this finding on his assessment of Ancar's demeanor which he found to be believable, the consistency of his testimony on this point and his inference that Rutherford's route would be viewed as desirable to other carriers. (ALJD at 5).

Counsel for the General Counsel ignores – but the ALJ did not – the undisputed evidence of why carriers would be acutely interested in Rutherford's route. Carriers were interested because the route involved was a desirable assignment. This was so in two respects: the regularly scheduled day-off on the route was a Saturday and it was a mounted route. Saturday is a preferred off day for letter carriers. (Tr. 376 (Vigee)). That is because the mail is not delivered on Sunday and if Saturday is the regularly scheduled day off the carrier will have two consecutive days off in a week and the weekend free. (Tr. 376 (Vigee)). Because the route was mounted, it was also less physically demanding because a Postal Service vehicle would, in effect, carry the mail rather than the letter carrier. (Tr. 377 (Vigee)).

Banks' testimony was subpoenaed by the General Counsel and he confirmed that he asked Ancar to ascertain the facts. (Tr. at 297 (Banks) ("Q: You asked him to look into how

many days she had been working as a 204-B? A: Yes, sir.")).[8] Banks also testified, without rebuttal, that he told Rutherford that other letter carriers were discussing among themselves that they believed Rutherford was detailed as a supervisor over four months and that he advised her to return to her route to avoid having it posted for bid. (*See* Tr. 283-85 (Banks)). Rutherford told Banks to mind his own his own business and get back to work. (Tr. 283 (Banks)). After the Branch enforced the agreement, Banks bid on the route because it was less taxing than his walking route and the Postal Service had said there was no work available consistent with Banks' physical condition otherwise. (Tr. 279-280 (Banks)).

Counsel for the General Counsel's claim that Banks' testimony shows that Ancar's testimony was "a fabrication, pretext, evidence of shifting defenses and unlawful motive," is delusional, Br. at 22. Similarly wide of the mark is the General Counsel's contention that in investigating whether there was a grievance, the Branch improperly delegated its authority apparently to unit members. Br. at 43. This, too, is baseless. As the Board has held "in seeking to support the contract . . . [the union] is acting directly in support of the obligation imposed on a statutory representative to represent all employees without hostile discrimination, fairly, impartially and in good faith." *International Bhd. Of Elec. Workers, Local 1701*, 252 N.L.R.B. 820, 831 (1980). Had the Branch not looked into the matter, it would likely have faced unfair labor practice charges from carriers alleging that it had failed in its duty to enforce the agreement to favor Rutherford.

[8] Contrary to Counsel for the General Counsel's claim, Br. at 22, this testimony was entirely consistent with the Branch's position statement that Banks asked that the contract be enforced. *See* GC-19.

None of this provides a basis for revisiting the ALJ's credibility determination that Ancar's testimony that carriers lobbied him to look into the issue. Exception 13 should be overruled.

B. Exceptions Related to the February Meeting Between Ancar, Rutherford and Bart (No. 3 and 5)

Counsel for the General Counsel takes exception to the ALJ's decision not to credit Bart's testimony that Ancar told Bart and Rutherford that a one day return to the craft would be enough to trigger a new four month period under Article 41 Section 1.A.2. (Exception 3). The ALJ declined to credit this testimony noting that the labor agreement provides that a temporary supervisor may not be temporarily returned to the craft to avoid the time limit in the contract and the fact that Ancar filed the grievance shortly thereafter. (ALJD at 5 and n.11). Counsel for the General Counsel points to nothing that would support revising this finding. Indeed, Counsel's assertion that Ancar did not deny telling Bart and Rutherford that one day would suffice is not to be found in the record cited in Exceptions 3 and 5 or at Br. at 11 where this Exception is discussed.

Exceptions 3 and 5 should be overruled.

C. Exceptions Related to the June Meeting Between Ancar, Rutherford and Bart and the Records Related to Rutherford's Time and Attendance (Nos. 4, 6, 7, 8, 14, 19, 21 and 23)

A central contention of Counsel for the General Counsel was that the Branch's grievance was meritless (and thus improper) because Rutherford performed letter carrier work on February 18, breaking the four-month period. (*See* Exception 4). In this respect, Counsel for the General Counsel relies upon Bart and Rutherford's testimony that Ancar stated that he looked at whether there were carrier operation codes on time and attendance records to ascertain whether Article 41 Section 1.A.2 was violated. (*Id.*).

On June 21, 2012, Ancar asked management to provide him with Rutherford's time records (known as clock rings) from February 18 through June 20, 2012 and Postal Service forms 1723 detailing Rutherford to a supervisory position. (GC-12B). The clock rings Ancar received, (RU-1), showed that Rutherford was classified and paid as a supervisor – denominated as "H/L E0-17" – from February 18, 2012 through June 20. (Tr. 213-216 (Ancar)). Ancar testified that he looked to whether the clock rings reflect that Rutherford was coded and thus paid as a supervisor for the requisite period and not whether (while she was coded and paid as a supervisor) Rutherford performed bargaining unit work. (*See id.*) So did Gabriel. (Tr. at 453 (Gabriel)).

The clock rings show that Rutherford was "detailed" as a supervisor "in excess of four months" whether this is interpreted as four calendar months or 120 days, as it is 123 days. (Tr. 214 (Ancar)).[9] If anything, as Vigee testified, the fact that Postal Service assigned Rutherford bargaining unit work while she was detailed to a supervisory position (as shown by the "H/L E0-17" code on the time records) was a violation of Article 1.6.A of the agreement. (Tr. 379 (Vigee)).

General Counsel contends that Ancar's reliance on the fact that Rutherford was classified and paid at higher level was evidence of bad faith because Bart and Rutherford testified that Ancar said that he looked at whether a supervisor was working in the craft during the relevant period. (Tr. 69-70 (Bart); Tr. 519 (Rutherford)). But Rutherford's initial statement to the Board concerning this conversation omitted any mention of this. (Tr. 590-91(Rutherford)). So did the initial affidavit she prepared in this proceeding on July 26, 2012. (Tr. 569 (Rutherford)). Only *after* she had been told that the she was paid at a higher level on February

[9] Of course, as the ALJ noted the period was actually substantially longer because Rutherford began her management duties on January 31. (ALJD at 9 n.23).

18, did Rutherford on September 28, 2012 amend the July 26, 2012 affidavit to include the allegation that Ancar looked for carrier work codes on the clock rings. (Tr. 573 (Rutherford)). Similarly, Bart's June 22 memo concerning the conversation omits any mention of this issue. GC-9.[10]

Even if one were to credit Rutherford's convenient recollection,[11] Bart clearly did not testify that the presence of a carrier code was the only thing Ancar would look for. (Tr. at 69 (Bart) ("That's one of the things, you know, that he looked for, and that was it on that part."). It was certainly not unreasonable to take the position that in determining whether Rutherford was "detailed to a supervisory position" within the meaning of Article 41.1.A.2, the most relevant information would be whether she was, in fact, classified and paid as a supervisor.[12]

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[10] General Counsel's Exception related to this exhibit (Exception 6) asserts that the memorandum reflects a concession in the fourth paragraph that Ancar conceded he gave other 204b's a second chance when they exceeded the four month limit. It says no such thing. As noted, *supra,* the notion that the Branch failed to warn Rutherford is baseless: there is no dispute that at the outset of Rutherford's tour in management that Ancar informed her of the four month rule in Article 41 Section 1.A.2. (ALJD at 4, 9). The notion that Ancar's failure to do more is somehow evidence of animus (*see* Br. at 15-16), cannot support the weight General Counsel would place on it. General Counsel's contention that the ALJ's failure to mention GC-9 in the decision was somehow error (Exception 8) should be rejected because the only additional material fact in GC-9 is that it nowhere makes the claim that Ancar was solely focused in his investigation on whether the time and attendance records showed carrier operation codes on the dates in question.

[11] Rutherford also conceded that in submitting an EEO complaint alleging that the Postal Service declared her route vacant because of her gender and race, Rutherford denied that there were grievance proceedings over the issue and omitted her claim in this case that she was discriminated against because she was not a member of NALC. (Tr. 585-86 (Rutherford)).

[12] Bart testified that Rutherford should not have been paid at higher level pay for February 18 because she was reassigned to the craft that date and that appropriate notification was provided to Postal Service management to effect that change. (Tr. 46-49 (Bart); GC-6B). Rutherford was, however, classified and paid as a supervisor that day and, testified, incredibly, that she was unaware of instances where she was paid at the supervisory level while doing letter carrier work. (Tr. 527-28 (Rutherford)). In any event, there was no evidence presented that Ancar or anyone else at the Branch was made aware of this and there was no evidence that any such evidence was made available to the Postal Service manager who reviewed the clock rings and settled the

Indeed, the DRT had taken just that approach in an April 2010 decision from New Orleans (RU-2B at p. 3) and looked to whether the carrier was on "higher level" in resolving a grievance Ancar initially filed at Algiers in February 2012 (RU-4B at p. 3 (grievance involving route held by Kenya Roybiske)). Counsel for the General Counsel ignores the import of this grievance resolution but it is fatal to its contention that the Branch acted inappropriately, as that interpretation of the agreement was binding on the parties.

As reflected in the JCAM, DRT decisions establish precedent in the installation where the grievance arose, here, New Orleans: "For this purpose, precedent means that the decision is relied upon in dealing with subsequent similar cases to avoid the repetition of disputes on similar issues that have been previously decided in that installation." (RU-6 at p. 15-8). Thus, under the grievance process, the issue under Article 41 Section 1.A.2 must be decided by reference to whether the employee was classified and paid at the supervisory level. Of course, at the time of the discussion with Ancar, Bart, too, believed that Rutherford had exceeded the four month period under Article 1.A.1. and was asking Ancar to overlook it because "[i]t was only a few days," apparently disregarding times when Rutherford did letter carrier work but continued to be paid as a supervisor. (*Id.*)

In Exception 19 the General Counsel takes exception to the ALJ's additional reasoning supporting his conclusion that the Branch's inclusion of February 18, 2012 was "valid." (ALJD at 8 n.21). The reasons the ALJ advances are entirely correct. The collective bargaining agreement provides that reassignment of a carrier to the craft to avoid the operation of Article 41 Section 1.A.2 is ineffective. (*See* ALJD at 2-3; RU-6 Art. 41.1.A.2 (p. 116)). Even if Rutherford had been paid as a letter carrier and her work as a craft employee on February 18

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grievance at Formal A. Contrary to Counsel for the General Counsel's claim, none of this can support an inference that the Branch acted in bad faith.

would otherwise break the four-month period – and it would not since Rutherford was classified and paid as a supervisor – the parties could reasonably conclude that it was a subterfuge given Rutherford's immediate return to management.[13] As the ALJ noted the arbitration decision Counsel for the General Counsel did not address that issue. (ALJD at 11 n.21). The DRT, however, concluded that the relevant inquiry is whether the 204b was classified and paid as a supervisor and that decision is binding on the parties here.

Finally, Counsel for the General Counsel takes issue (Br. at 28-29) with the ALJ's conclusion that the Branch has a "valid interest" in not leaving mail routes in an "indefinite limbo." (ALJD at 9). Counsel urges that Rutherford returned to the craft soon after the grievance was filed. (Br. at 29). But this ignores that the route was unavailable for bid assignment from January 31 through late June. That is the "indefinite limbo" that Article 41 Section 1.A.2 addresses, as the ALJ correctly concluded.

None of this provides a basis for overturning the ALJ's conclusions that the Branch had a good faith basis for pursuing the grievance. Exceptions 4, 6, 7, 8, 14, 19, 21 and 23 should be overruled.[14]

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[13] Counsel for the General Counsel's assertion that Rutherford's letter carrier work was innocent on February 18 because there was a staffing shortage that day (Br. at 15), ignores that Rutherford was classified in management and paid as a supervisor for that day but was doing bargaining unit work.

[14] Counsel for the General Counsel contends that the ALJ improperly failed to assess the significance of the fact that Ancar supposedly did not warn Rutherford that her time was up before he filed the grievance. (Exception 4; Br. at 16, 32 (supposed failure to warn Rutherford "essentially proves the violations in the CB complaint"). This ignores that in February, Ancar told Rutherford that she had 120 days to serve in management (ALJD at 4). It also ignores Banks' testimony that when he told Rutherford that her time was nearly up and other carriers were following the issue that she essentially told him to buzz off and get back to work. (*See* Tr. 283-85 (Banks)).

D. Exceptions Related to Gabriel's Motivations in Settling the Grievance and Concerning Gabriel's July 5 Conversation with Rutherford (Nos. 9, 10, 11, 12, 16, 17 and 18)

Counsel for the General Counsel takes direct issue with the ALJ's assessment that Gabriel's "demeanor was stellar; she was outspoken, glaringly honest, willing to concede her own failure to consider alternatives, and possessed a limited stake in the outcome." (Exception 18 quoting ALJD at 6). There is no basis in the record evidence to reverse the ALJ's considered judgment. In particular, with respect to whether Gabriel was aware of Rutherford's union status, Gabriel testified that no one from the Union told her that Rutherford was not an NALC member; nor did they tell her that the Branch was only pursuing the grievance because of Rutherford's status as a non-member. (Tr. 491 (Gabriel); *see* GC-31 ¶4). Gabriel does not have access to information concerning Union membership status and, as she testified she did not "need that information" in her position. (Tr. 482 (Gabriel)). Gabriel denied having told Rutherford that she (Gabriel) had heard from unidentified persons that if Rutherford was an NALC member "all of this would have been taken care of." (Tr. 491 (Gabriel)). This was absent from Rutherford's initial statements concerning the discussion with Gabriel. (Tr. 591-93 (Rutherford)). That Rutherford's self-interest lead her to fabricate this tale is perhaps too obvious to state.[15]

Counsel for the General Counsel's contemptuous assertion that Ancar focused his testimony on "denigrating Rutherford and exhibiting his insensitivity," Br. at 26, is scurrilous and does not merit a response.

[15] Counsel for the General Counsel urges that Gabriel did not specifically deny that Bart testified that Gabriel had said similar things to her and that this is evidence that Gabriel (and the Branch acted on improper grounds (*e.g.*, Br. at 28, Exceptions 9 and 10). It is obvious, however, from the ALJ's assessment of Gabriel's testimony that he did not credit Bart's testimony of that supposed conversation.

There is no basis on this record to question or overturn the ALJ's assessment of Gabriel's credibility.[16]

E. Exceptions Related to the Branch's Enforcement of Article 41 Section 1.A.2 (Nos. 15, 19, 20, 21, 24, 25 and 26)

Counsel for the General Counsel takes exception to the ALJ's decision to credit Branch President Vigee's testimony concerning the handling of the grievance concerning Rutherford's route and other Article 41 Section 1.A.2 cases. (Exception 15). The ALJ's conclusion that Vigee's testimony was "essentially unrebutted, plausible and consistent with documentary evidence" (ALJD at 6), is supported by evidence that the Branch processed grievances involving letter carriers:

- Wanda Riley, who Vigee believed (although he was not certain) was a member of the Union (Tr. 397 (Vigee); RU-2A, RU-2B);
- Darlene Torregano, who attended the NALC convention with her husband who was active in the Union (Tr. 403-405 (Vigee); RU-3A, RU-3B);
- Kenya Roybiske, whose membership status was unknown to Vigee (Tr. 409 (Vigee); RU-4A, RU-4B); and
- Lori Chambers (RU-5A, RU-5B).

Counsel for the General Counsel labors mightily (Br. at 31-34), to discount this evidence principally by minutely dissecting the time the Branch took to file grievances in these other cases and then postulating that these differences are somehow material and show animus.

[16] Counsel for the General Counsel's quibble (Exception 16) with the ALJ's conclusion that Gabriel "speculated" that Rutherford might have fallen short of the contractual limit had February 18 not been considered, is hardly error. It accurately summarizes the testimony and reflect, as the ALJ found Gabriel's "willing[ness] to concede her own failure to consider alternatives." (ALJD at 6).

But the stubborn facts are as the ALJ found: the Branch enforced the agreement in other cases involving NALC members. With respect to the timing issue, the Branch could have filed a grievance as early as March 31 because Rutherford began her detail on January 31. (ALJD at 9 n.23). There was no rush to file with respect to Rutherford. This evidence supports rather than detracts from a finding that the Branch acted in good faith the ALJ was hardly "wide of the mark," Br. at 27, by noting the obvious import of this.

So, too, does the ALJ's conclusion that vacating Rutherford's route was a "facially neutral act, which did not promote the interests of Union members over non-union members[.]" (ALJD at 8 n.22). Counsel for the General Counsel presented no evidence that the Branch knew (or should have known) that a carrier senior to Rutherford would bid for the route (or the regularly scheduled day off associated with it (as the route and the day-off were separately bid under the local agreement)). It introduced no seniority rosters or membership information, although it could have done so. Instead, Counsel for the General Counsel speculates that Ancar must have known the seniority position of the various carriers, who was in NALC and who not and which carriers would have bid. (Br. at 30). Unless one were to posit that New Orleans letter carriers possess a sort of wizardly sixth sense, this undercuts the contention that the Branch was motivated to harm a non-member, as the ALJ correctly concluded.

Finally, Counsel for the General Counsel's contention that Cage's lack of knowledge concerning Rutherford's status is "irrelevant" (Br. at 29), must be rejected. Cage was the representative of the Branch who settled the grievance with management.[17] That settlement

[17] The idea that Cage's testimony supports the notion that Vigee and Gabriel had "worked out some informal resolution" of the grievance ahead of time (Br. at 38), is rank speculation. Cage did not discuss the grievance with Ancar at all. (Tr. 316 (Cage)). Vigee testified that he

was binding on the Postal Service and is what lead to the eventual posting of Rutherford's route. Counsel's Alice-in-Wonderland view that the knowledge of the Union agent who actually entered into the relevant grievance settlement is somehow beside the point, is ample demonstration of the weakness of these Exceptions. The ALJ rightly concluded that Cage's lack of knowledge "undercuts any contention that the Union's actions were discriminatory." (ALJD at 9).

Exceptions 15, 19, 20, 21, 24, 25 and 26 should be overruled.

F. Miscellaneous Exceptions (Nos. 1, 2 and 22)

Counsel for the General Counsel takes exception to the ALJ's failure to include reference to provisions of the JCAM to the effect that 204b's continue to accrue seniority in the letter carrier craft during their time in management. (Exception 1). There is no basis to so revise the decision because this is irrelevant to issues in the case. There is no dispute over Rutherford's relative seniority among the carriers at her station and the fact that she continues to accrue seniority in the craft does not affect whether she was a supervisor and not a part of the bargaining unit at relevant times. Counsel's exception that the ALJ failed to precisely note when Rutherford returned to the craft in 2012 (Exception 2) should be overruled because the date is noted at ALJD at 8.

Finally, Counsel for the General Counsel takes issue with the ALJ's decision to revoke subpoena B-716527's paragraph 41. (Exception 22). That paragraph sought files for grievances proceeding to Step B or arbitration where the NALC or "one of its Branches" sought to enforce the provisions of Article 41 of the national agreement relevant here. The ALJ

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may have had a brief conversation with Cage identifying the nature of the case. (Tr. 388-89 (Vigee)). Cage did not recall whether he discussed the case with Vigee. (Tr. 316-17 (Cage)).

properly limited the scope of the subpoena for the following reasons. As noted above, under the JCAM Step B decisions have precedential value limited to the specific installation where the grievance arose. (RU-6 at p. 15-8) The issue here is Branch 124's motive in advancing the grievances, nothing else. With respect to the NALC certain grievance documents would be located at the offices of the various National Business Agents. There are fifteen (15) such offices. (Other grievance files would be at the various Branches, which were not served with subpoenas. There are approximately 2,200 Branches affiliated with NALC). The Union agreed to provide General Counsel with arbitration decisions under Article 41.1.A.2 and Step B decisions arising in Branch 124's jurisdiction. Under these circumstances the ALJ's ruling was entirely correct because Counsel for the General Counsel's request was overbroad and unduly burdensome. Exception 22 should be overruled.

CONCLUSION

For the foregoing reasons, Counsel for the General Counsel's exceptions should be overruled and the amended complaint dismissed.

Dated: New York, New York
February 13, 2015

Respectfully submitted,

By: */s/ Thomas N. Ciantra*

Thomas N. Ciantra
COHEN, WEISS AND SIMON LLP
330 West 42nd Street
New York, New York 10036-6979
(212) 563-4100

Attorneys for Respondents
National Association of Letter
Carriers AFL-CIO and Branch 124, NALC

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of February 2015, I served a copy of the foregoing document by first-class mail upon:

M. Kathleen McKinney
Regional Director
National Labor Relations Board
Region 15
600 Maestri Place, 7th Floor
New Orleans, Louisiana 70130-3408

Deborah Rutherford
2929 Aurora Drive
New Orleans, Louisiana 10131-4021

and by e-mail to:

Roderick Eves
Deputy Managing Counsel
Law Department - NLRB
United States Postal Service
1720 Market Street, Room 2400
St. Louis, Missouri 63155-9948

Steven Bensinger
National Labor Relations Board
Region 15
600 Maestri Place, 7th Floor
New Orleans, Louisiana 70130-3408

/s/ Thomas N. Ciantra
Thomas N. Ciantra